

Supreme Court, U. S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

77-298

No.

PETER JAMES,

Petitioner,

v.

WILMINGTON NEWS JOURNAL CO., et al.,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

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DISTRICT OF COLUMBIA CIRCUIT**

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above case on June 2, 1977.

OPINIONS BELOW

The United States District Court for the District of Columbia granted a Motion to Dismiss in favor of respondents. This motion was based upon an alleged lack of complete diversity as between the petitioner and the respondents pursuant to Title 28 U.S.C. § 1332.

In affirming the judgment of the District Court, the United States Court of Appeals for the District of Columbia Circuit, rendered no opinion.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was made and entered on June 2, 1977 and a copy thereof is appended to this petition in Appendix B. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Courts below abused their discretion in failing to sever a mere proper party, respondent Ida Kosciesza, as opposed to an indispensable one, when such failure supplied a jurisdictional defect upon which was predicated the dismissal of this action. Furthermore, whether there was an abuse of judicial discretion in light of the fact that this proceeding was originally commenced *pro se* and that the Courts below acted upon notice that a dismissal of this action foreclosed all other remedies as the applicable statute of limitations had run.

STATUTES AND FEDERAL RULES INVOLVED

The pertinent portions of Title 28 U.S.C. § 1254, Title 28 U.S.C. § 1332 and Rule 21 of the Federal Rules of Civil Procedure are set forth in Appendix C.

STATEMENT

On March 7, 1965 petitioner, Peter James, filed a Complaint *pro se* in the United States District Court for the District of Columbia. The named defendants in the Complaint, herein respondents, were three Delaware Corporations: (Wilmington) News Journal Co. ("News Journal"), E. I. du Pont de Nemours and Company ("DuPont") and Christiana Securities Company

("Christiana"); and three individuals: Richard P. Sanger, Norman E. Isaacs and Ida Kosciesza. In this Complaint petitioner alleged that certain defamatory and libelous articles were written and published by respondents.

Peter James had been adjudicated bankrupt on December 9, 1974. As the alleged defamatory material was published before such date of adjudication, it was believed that this suit was the property of the bankruptcy estate pursuant to Bankruptcy Act § 70a5. Thereafter on January 21, 1976 Martin S. Protas, Trustee in Bankruptcy, entered his appearance.

In December of 1975, respondents Christiana, News Journal and the individual respondents had filed motions to dismiss the action for lack of both personal and subject matter jurisdiction and for improper venue, or in the alternative, for transfer of the action to the United States District Court for the District of Delaware. On January 7, 1976 respondent DuPont filed a similar motion to transfer the action to the District of Delaware.

On January 15, 1976 petitioner's counsel filed a memorandum in opposition to News Journal's motion to dismiss or in the alternative to transfer. However, petitioner did not oppose the other respondents' motion to transfer the action to the district of Delaware.

On January 27, 1976 petitioner's counsel filed an Affidavit of Plaintiff Peter James in Opposition to Defendants' Motions, and on February 9, 1976 News Journal filed a Memorandum of Points and Authorities in response to that Affidavit.

The United States District Court for the District of Columbia, thereafter on February 27, 1976 ordered that the action should be dismissed because complete diversity of citizenship between all petitioners and respondents was lacking, and that therefore, the Court had no jurisdiction pursuant to Title 28 U.S.C. § 1332. (This Order appears in Appendix A).

Through counsel, petitioner filed a Notice of Appeal to the United States Court of Appeals for the District of Columbia Circuit on March 26, 1976. Petitioner, however, did not file a brief.

On motion the Trustee, Martin S. Protas, was granted leave to proceed *in forma pauperis* and his opening brief on appeal was served on August 16, 1976. Pursuant to an order of the United States Court of Appeals for the District of Columbia Circuit, this brief was struck as it appeared to the Court that no interest in this action vested in the Trustee. Petitioner, Peter James, was accorded thirty days in which to obtain counsel and file a brief.

After the filing of petitioner's brief through counsel and upon consideration of the issues presented in this cause, the Court of Appeals for the District of Columbia Circuit affirmed, without opinion, the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The Courts below abused their discretion in failing to sever a mere proper party, respondent Ida Kosciesza, as opposed to an indispensable one, when such failure provided the jurisdictional defect upon which the dismissal of this action was based.

Rule 21 of the Federal Rules of Civil Procedure provides that the Court should sever parties that are misjoined on such terms as are just, and that a mere misjoinder of parties *is not grounds* for dismissal. The rule further provides that, absent a proper motion by a party to the action, the Court may raise the issue *sua sponte*:

"Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or on its own initiative at any stage of the action on such terms as are just. Any claim against a party may be severed and proceeded with separately." FRCP 21

Despite the absence of a formal motion to sever, petitioner did encourage the United States District Court for the District of Columbia to so sever the allegedly nondiverse respondent. The petitioner's Memorandum of Points and Authorities in Opposition to the respondents' Motion to Dismiss and, In the Alternative, To Transfer this Action to the United States District Court for the District of Delaware stipulated that petitioner would be amenable to a severance of the claim against

respondent, Ida Kosciesza, so as to maintain diversity jurisdiction. The pertinent portion of this Memorandum is as follows:

"...Plaintiffs further oppose the motion of defendant News Journal Company to transfer the action to a different forum. Plaintiffs do not, however, oppose the motions of the various other defendants to transfer the remaining causes of action stated in the complaint to the District of Delaware. Defendants' argument that complete diversity between the plaintiffs and all defendants is lacking is effectively addressed by the aforementioned suggested severance of the various causes of action and the transfer of all but plaintiffs claims against defendant newspaper..."

The above-quoted passage substantiates petitioner's argument that, notwithstanding the absence of a formal motion to sever the mere proper and jurisdictional destroying party, Ida Kosciesza, the Courts below failed to preserve the petitioner's rights by severing the misjoined party and maintaining federal jurisdiction over the remaining respondents.

This failure by the Courts below is accentuated by the fact that the applicable statute of limitations had run prior to the dismissal of this action by the United States District Court for the District of Columbia. As a result of this dismissal, petitioner was foreclosed from seeking any and all judicial relief, whether it be state or federal. This fact was brought to the attention of the District Court in the petitioner's Memorandum of Points and Authorities in Opposition to the respondents' Motion to Dismiss. The pertinent portion is as follows:

"Plaintiffs' emphasize that dismissal of said remaining causes of action would clearly not be in the interest of justice in that:

- (1) Plaintiff who is inexperienced, filed the complaint herein *pro se* and without the benefit of counsel, and
- (2) dismissal would foreclose any possibility that plaintiff may be able to vindicate his rights in the Courts (State or Federal) in that the applicable statute of limitations has now run."

In view of the facts: that the Complaint was originally commenced *pro se*; that the running of the applicable statute of

limitations foreclosed all other relief; that the petitioner's above-quoted Memorandum of Points and Authorities clearly indicated an amenability to the severance of respondent Ida Kosciesza so as to maintain diversity jurisdiction over the remaining respondents, and that Rule 21 of the Federal Rules of Civil Procedure liberally allow the Court on its own initiative to sever misjoined parties, the petitioner herein contends that the Courts below abused their discretion in failing to take the steps necessary to maintain federal jurisdiction of this action. The net result being that petitioner has not yet had his day in Court and he now faces the possibility of never having that day.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari be granted.

NICHOLAS KAPNISTOS
D. MICHAEL BOOKER
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546 South 23rd Street
Arlington, Virginia 22202
Counsel for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PETER JAMES, et al.,

v.

Civil No. 75-310

WILMINGTON NEWS JOURNAL CO., et al.

ORDER

Upon consideration of the motions to dismiss or, in the alternative for transfer filed by defendants Christiana Securities Company, News Journal Company, Richard P. Sanger, Norman E. Issacs, and Ida Kosciesza, plaintiffs' oppositions thereto, the memoranda in support thereof and in opposition thereto, and all parties having been fully heard and considered in the premises, it appears to the Court that (1) jurisdiction in this action has been invoked pursuant to 28 U.S.C. §1332; and (2) complete diversity of citizenship between all plaintiffs and defendants is lacking.

It is, accordingly, by the Court this 27th day of February, 1976,

ORDERED that defendants' motion to dismiss should be, and the same is hereby, granted.

/s/ eligible
JUDGE

FILED
FEB 27 1976
JAMES E. DAVEY, CLERK

APPENDIX B

United States Court Of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1415

September Term, 1976

Peter James

Peter James d.b.a.

Peter James & Company, Appellant

Civil 75-0310

v.

(Wilmington) News Journal
 Company, et al.

FILED JUN 2 1977**GEORGE A. FISHER**
CLERK

Appeal from the United States District Court for the District of
 Columbia.

Before: BAZELON, Chief Judge, TAMM, Circuit Judge,
 and JONES,* United States Senior District Judge
 for the United States District Court for the District
 of Columbia

JUDGMENT

This cause came on to be heard on the record on appeal from
 the United States District Court for the District of Columbia,
 and was argued by counsel. While the issues presented occasion
 no need for an opinion, they have been accorded full
 consideration by the Court. See Local Rule 13(c).

On consideration of the foregoing, It is ordered and adjudged
 by this Court that the judgment of the District Court appealed
 from in this cause is hereby affirmed.

Per Curiam
 For the Court

/s/ George A. Fisher
GEORGE A. FISHER
 Clerk

*Sitting by designation pursuant to 28 U.S.C. §294(c).

APPENDIX C

STATUTES INVOLVED

Title 28 U.S.C. §1254(1)

“Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.”

Title 28 U.S.C. §1332(a)(1)

“The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and is between

- (1) citizens of different States;”

FEDERAL RULES OF PROCEDURE

Rule 21

“Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court of motion of any party or on its own initiative at any stage of the action on such terms as are just. Any claim against a party may be severed and proceeded with separately.”